

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7278

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X

REBECCA REYHER and RUTH GANNETT, :

Appellants, :

v. :

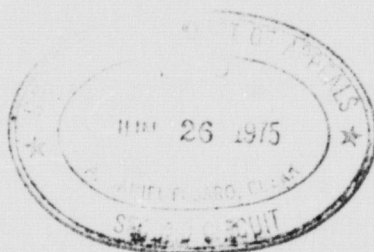
CHILDREN'S TELEVISION WORKSHOP and :
TUESDAY PUBLICATIONS, INC., :

Appellees. :

----- X

On Appeal from the United States
District Court for the Southern
District of New York

APPELLANTS' APPENDIX

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RELEVANT DOCKET ENTRIESDate

Feb. 10, 1972	Filed Complaint. Issued Summons
Apr. 3, 1972	Filed Defendants' Answer to Complaint
July 17, 1973	Filed Plaintiffs' Note of Issue and Statement of Readiness
Dec. 3, 1973	Filed Defendants' Affidavit and Notice of Motion for an Order For Summary Judgment
Jan. 28, 1974	Defendants' motion for Summary Judgment is denied
Jan. 6, 1975	Decision of Court for Defendants
Apr. 2, 1975	Motion for New Findings and for an Amended Judgment or New Trial Denied
Apr. 25, 1975	Filed Plaintiffs' Notice of Appeal From Order of 4-2-75 in Favor of Defendants

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
REBECCA REYHER and RUTH GANNETT,

Plaintiffs,

-against-

CHILDREN'S TELEVISION WORKSHOP
and TUESDAY PUBLICATIONS, INC.,

Defendants.
-----x

NOTICE OF APPEAL

72 Civ. 527
(J.M.C.)

PLEASE TAKE NOTICE that the plaintiffs, REBECCA
REYHER and RUTH GANNETT appeal from the order of Judge John M.
Cannella of April 2, 1975 in favor of the defendants.

YOURS,

ELEANOR JACKSON PIEL
Attorney for Plaintiffs

April 22, 1975

TO: COUDERT BROTHERS
200 Park Avenue
New York, New York

JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
REBECCA REYHER and RUTH GANNETT, :

Plaintiffs, :

-against- :

CHILDREN'S TELEVISION WORKSHOP and :
TUESDAY PUBLICATIONS, INC., :

Defendants. :

Civil Action File No.:
72 Civ. 627

JUDGMENT

-----X
The issues in the above entitled action having been brought on regularly for trial before the Honorable John M. Cannella, United States District Judge, on April 23 and 24, 1974, and at the conclusion of the evidence, and upon consideration thereof, the court having rendered and filed an opinion and made and filed findings of fact and conclusions of law, all dated January 6, 1975, it is,

ORDERED, ADJUDGED AND DECREED, that defendants CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC., have judgment against the plaintiffs, REBECCA REYHER and RUTH GANNETT, dismissing the complaint with costs.

Dated: New York, New York
January 10, 1975

Clerk

JUDGMENT ON REHEARING

REYHER and GANNETT v.
CHILDREN'S TELEVISION
WORKSHOP, ET AL.

72 Civ. 627
(JMC)

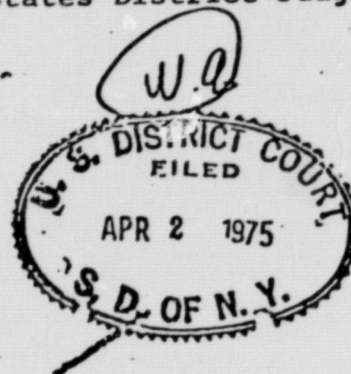
ENDORSEMENT AND ORDER

The motion for reconsideration is granted.
Upon reconsideration the Court adheres to its earlier
ruling and denies plaintiffs' motions for new findings
(Fed.R.Civ.P. 52(b)) and for an amended judgment or
new trial (Fed.R.Civ.P. 59).

So Ordered.

John M. Cannella
JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
April 1, 1975.



MICROFILM

APR 02 1975

DISTRICT COURT OPINION DISMISSING THE COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

REBECCA REYHER and RUTH GANNETT,

Plaintiffs,

-against-

CHILDREN'S TELEVISION WORKSHOP
and TUESDAY PUBLICATIONS, INC.,

Defendants.

: MEMORANDUM OPINION

: 72 Civ. 627 (JMC)

-----X

CANNELLA, D.J.:

This copyright infringement action was tried to the Court without a jury. After consideration of the facts presented and the law applicable thereto, the Court finds for the defendant and dismisses the complaint.

The plaintiffs herein, Rebecca Reyher and Ruth Gannett, the copyright holders, and respectively the author and illustrator of a children's book entitled, "My Mother Is the Most Beautiful Woman in the World," allege that the defendants, Children's Television Workshop ("CTW") and Tuesday Publications, Inc. ("TPI"), have copied said book and, have, thereby infringed upon plaintiffs' copyright. The alleged infringement occurred when CTW, a non-profit corporation, engaged in, among other activities, the production of the educational children's

District Court Opinion
Dismissing the Complaint

television program known as "Sesame Street", produced and caused to be shown on television a segment of the "Sesame Street" program entitled "The Most Beautiful Woman in the World" and when, thereafter, CTW caused articles to be published in both the English and Spanish language versions of the Sesame Street Magazine entitled "The Most Beautiful Woman in the World." Finally, it is alleged that TPI infringed upon plaintiffs' copyright by causing the publication, in an edition of "Tuesday at Home", of a story entitled "The Most Beautiful Woman in the World".

Plaintiffs' book, which was copyrighted in 1945, tells a simple but pointed story. In essence, it relates the tale of a small Russian peasant girl who is lost in the Ukraine. The little girl, having been separated from her mother, makes her way to a village where she tells the inhabitants only that "my mother is the most beautiful woman in the world." Upon hearing this, the villagers proceed to search the surrounding area and to bring all of the local beauties to see the little girl in the hope that one of them will turn out to be her mother. Eventually, the little girl's mother does appear, she is, to the villagers' surprise, a rather homely looking woman. The little girl, however, is not surprised and

District Court Opinion
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tells the villagers, "this is my mother, the most beautiful woman in the world." The moral, as the village leader points out, is that "we do not love people because they are beautiful, but they seem beautiful to us because we love them."

It is clear to this Court, having viewed the relevant "Sesame Street" segment and read the three magazine articles involved, that there is a substantial similarity between plaintiffs' copyrighted book and defendants' allegedly infringing works. Although the only phrase which appears in both works is "Once upon a time, long, long ago," and although there is little, if any, actual paraphrasing of plaintiffs' book in defendants' works, no individual comparing the works at bar could help but conclude that they are substantially similar. While defendants' rendition of the story takes place in a different locale and is told with fewer frills than plaintiffs', both stories present an identical sequence of events.

Nonetheless, before it can be determined whether there has been an infringement of plaintiffs' copyright, the Court must first determine exactly what is protected by that copyright. In the instant case, we have a book which the author candidly admits is based upon a story

District Court Opinion
Dismissing the Complaint

which was told to her by her Russian mother. It is the belief of plaintiff Reyher (although no direct evidence was adduced to this effect) that the story told to her by her mother is in fact a Russian folk tale. It is clear from plaintiff's testimony that the story line as it appears in her copyrighted book is substantially taken from, if not identical with, the story told to her by her mother. Mrs. Reyher testified that she had "taken a storyline, but I have adapted it and that's a synonym for retold and that's why I raise no objection to retold. It's my treatment. That's what this book is, even though it was my mother's story." (Tr. 120)

Plaintiff did not testify that she had added anything to the story or changed it in any significant way. In fact, the plaintiff indicated that she wrote the book using a Russian dictionary. This clearly suggests a process whereby plaintiff attempted to recall the story as told to her by her mother in Russian, and then to translate that recollection into English. As plaintiff Reyher herself explained the process,

[i]t not only required a translation, it required two volumes of a Russian dictionary to check certain words and impressions that I had because this was an impression rather than a literal translation. Anything that I used that she [her mother] had told me might have been a translation, but it also was primarily a mood and mine was an interpretation. (Tr. 71-72)

District Court Opinion
Dismissing the Complaint

It is thus clear to the Court that plaintiffs' book is a "derivative" work. That is, it has been "substantially copied from a prior work" in the public domain. (1 M. Nimmer on Copyright § 39 at 166). The accepted rule as restated in the proposed copyright law (see Goodis v. United Artists Television, Inc., 425 F.2d 397, 402-03 (2d Cir. 1970); Rohauer v. Killiam Shows, Inc., 379 F.Supp. 723, 728 (S.D.N.Y. 1974)), is that "[t]he copyright in a derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work...." As one court has put it, if the work allegedly infringed upon is of a derivative nature,

[t]he plaintiff ... should be expected to state to us what it is in the story that is copyrightable as new and novel and what part of such material, if any, has been misappropriated by the appellant.

....

In the case at bar, if it be assumed that there are such similarities between [the two stories] as to provoke in the casual observer the consciousness that there is such a similarity between them, and that copying may be inferred therefrom, we are still confronted with the fact that mere similarity does not necessarily involve literary piracy or an infringement of a copyright. Such similarities then as exist would require further analysis to determine whether or

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Dismissing the Complaint

not they are novel in the story and thus copyrightable. The copyright of the story only covers what is new and novel in it, so that the question of infringement involves a consideration of what is new and novel in the story to which the author has acquired a monopoly which has been misappropriated by another. Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 22-24 (9th Cir. 1933). See also Axelbank v. Rony, 277 F.2d 314, 317 (9th Cir. 1960).

Given the derivative nature of plaintiffs' work, the plaintiffs can prevail only if defendants have copied material which was plaintiffs' "original intellectual product" as opposed "to the old public domain elements of which [the author] has made use." Costello v. Loew's Corp., 159 F.Supp. 782, 784 (D.D.C. 1958). Here, Reyher's "original intellectual product" surely includes the translation of her mother's story, and it just as surely does not include the plot or sequence of events appearing therein. There is no allegation and the facts will not support a finding that the defendants have either copied plaintiffs' work verbatim, or have paraphrased it. The most that could be said is that they have read the plaintiffs' work and have retold the story in their own words. Such a finding will not, given the derivative nature of plaintiffs' work, support a cause of action for copyright infringement. The defendants have not infringed upon any substantial portion of plaintiffs'

District Court Opinion
Dismissing the Complaint

copyrighted book in which plaintiffs can claim a proprietary interest granted by the copyright laws. In a sense, the defendants have done nothing more than make their own variation of the story Mrs. Reyher's mother had told her as a child. There being no claim by Mrs. Reyher that her mother's story is copyrighted or that it is entitled to any form of protection, the defendants have the same right to make use of it as does Mrs. Reyher, herself. Thus, defendants' use of a story line which is substantially similar to that appearing in plaintiffs' copyrighted book does not give rise to a cause of action under the copyright laws.

In addition to the claim that the defendants have copied the story appearing in "My Mother is the Most Beautiful Woman in the World," plaintiffs allege that a drawing by Tybor Gergley, depicting the reunion scene at the conclusion of the story, appearing in defendant TPI's publication "Tuesday At Home," infringed upon an illustration by Ruth Gannett appearing in plaintiffs' copyrighted book. The Court, having compared the Gannett drawing with that by Tybor Gergley, finds that the Gergley illustration does not infringe upon Gannett's work.

In determining whether or not the Gergley illustration of the reunion scene is an infringement of

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Gannett's drawing of the same event, it is helpful to recall the words of Judge Learned Hand in a case involving the infringement of a textile design copyright:

The test for infringement of a copyright is of necessity vague. In the case of verbal "works" it is well settled that although the "proprietor's" monopoly extends beyond an exact reproduction of the words, there can be no copyright in the "ideas" disclosed but only in their "expression." Obviously, no principle can be stated as to when an imitator has gone beyond copying the "idea," and has borrowed its "expression." Decisions must therefore inevitably be ad hoc. In the case of designs, which are addressed to the aesthetic sensibilities of an observer, the test is, if possible, even more intangible. No one disputes that the copyright extends beyond a photographic reproduction of the design, but one cannot say how far an imitator must depart from an undeviating reproduction to escape infringement. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

Although the two illustrations here at issue do evince more than a passing similarity (in both the reunited mother and child are depicted running toward each other with arms similarly outstretched, in both the child's feet are positioned with the left foot raised in a similar fashion, finally, in both the posture of the mother and the relative positioning of the mother and child are similar), it is

District Court Opinion
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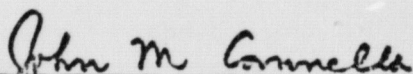
this Court's finding that the differences between the two (the characters in the more impressionistic Gergley illustration are black Africans dressed in their native garb, while in the Gannett drawing they are Caucasians in Russian peasant outfits, additionally, the Gergley child is a boy while Gannett's is a girl, and the Gergley mother has a package on her back and a stick at her feet while the Gannett mother is shown without accoutrements) are so substantial that the "average layman would indeed detect numerous differences ... which tend to eliminate any substantial similarity of protected expression."

Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co., Inc., No. 74-1774 (2d Cir. Dec. 20, 1974) slip op. at 934 (footnote omitted). Thus, it cannot be said that the Gergley illustration infringes upon Gannett's work.

For the reasons set forth above, it is hereby ordered that the complaint be and hereby is dismissed, with costs, but without attorney's fees, to the defendants.

The foregoing constitute the Court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a).

Enter Judgment.



JOHN M. CANNELLA, U.S.D.J.

Dated: New York, N.Y.
January 6, 1975.

DISTRICT COURT OPINION DISMISSING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REBECCA REYHER and RUTH GANNETT,

Plaintiffs,

-against-

72 Civ. 627 JMC

CHILDREN'S TELEVISION WORKSHOP and
TUESDAY PUBLICATIONS, INC.,

Defendants.

CANNELLA, J.

M E M O R A N D U M

Motion by the defendants for summary judgment dismissing the complaint as a matter of law, made pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, is denied.

In this copyright infringement action the plaintiffs, author and illustrator, allege that the defendants unlawfully copied their work, "My Mother Is The Most Beautiful Woman In The World" by virtue of the defendants' television production and subsequent magazine publication of a "substantially similar" folk story. On this motion it is not necessary to fully set forth the facts of this case or state the allegations of the parties, indeed, to do so would disserve the interests of judicial economy. All

District Court Opinion Dismissing Defendants' Motion
For Summary Judgment

that is necessary to preclude summary judgment is the existence of a genuine issue as to a material fact or facts. Such facts are here present and the instant motion is denied.

A defendant's motion for summary judgment in a copyright infringement case should be granted only in the rarest instances. See, Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); S. Rothenberg, Legal Protection of Literature, Art and Music, §188 at 203 (1960); M. Nimmer, Nimmer on Copyright, §138 at 599-600 (1965). Arnstein v. Porter, supra, clearly the leading national authority on motions of the instant nature, is controlling here. The following excerpts from Judge Frank's opinion in Arnstein, in which Judge Learned Hand joined, interlineated to reflect the facts of the instant case, are dispositive on this motion. 154 F.2d at 463-470.

The principal question on this appeal is whether the lower court, under Rule 56, properly deprived plaintiff of a trial of his copyright infringement action. The answer depends on whether "there is the slightest doubt as to the facts." [Citations omitted] In applying that standard here, it is important to avoid confusing two separate elements essential to a plaintiff's case in such a suit: (a) that defendant copied from plaintiff's

District Court Opinion Dismissing Defendants' Motion
For Summary Judgment

copyrighted work and (b) that the copying (assuming it to be proved went so far as to constitute improper appropriation.

As to the first--copying--the evidence may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence--usually evidence of access--from which the trier of the facts may reasonably infer copying. Of course if there are no similarities, no amount of evidence of access will suffice to prove copying. If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying. On this issue, analysis ("dissection") is relevant, and the testimony of experts may be received to aid the trier of the facts. If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result.

If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation). On that issue (as noted more in detail below) the test is the response of the ordinary lay hearer; accordingly, on that issue, "dissection" and expert testimony are irrelevant.

In some cases, the similarities between the plaintiff's and defendant's work are so extensive and striking as, without more, both to justify an inference of copying and to prove improper appropriation. But, such double-purpose evidence is not required; that is, if copying is otherwise shown, proof of

District Court Opinion Dismissing Defendants' Motion
For Summary Judgment

improper appropriation need not consist of similarities which, standing alone, would support an inference of copying.

Each of these two issues--copying and improper appropriation--is an issue of fact.

We turn first to the issue of copying. After listening to the compositions as played in the phonograph recordings submitted by defendant [after reading plaintiffs' book and defendants' television script and magazine stories] we find similarities; but we hold that unquestionably, standing alone, they do not compel the conclusion, or permit the inference, that defendant copied. The similarities, however, are sufficient so that, if there is enough evidence of access to permit the case to go to the jury, the jury may properly infer that the similarities did not result from coincidence.

Summary judgment was [is] then, proper if indubitably defendant did not have access to plaintiff's compositions. Plainly that presents an issue of fact. . . .

. . . [E]ven if we were to disregard the improbable aspects of plaintiff's story, [no tale of thugs or stooges is told herein] there remain parts by no means "fantastic." On the record now before us more than a million copies of one of his compositions were sold; copies of others were sold in smaller quantities or distributed to radio stations or band leaders or publishers, or the pieces were publicly performed. [Plaintiff's book was first published 28 years ago. It enjoys a worldwide distribution. It has been reprinted in whole or in part in various anthologies and collections, and has been the subject of

District Court Opinion Dismissing Defendants' Motion
For Summary Judgment

educational films and television and radio programs. For a four year period the plaintiff author conducted a weekly radio program on which she was introduced as the author of this book. The book here involved has also received mention in several nationally syndicated newspaper columns.] ^{1/} If, after hearing both parties testify, the jury disbelieves defendant's denials, [here, as in Arnstein, defendants' author, Jon Stone, completely denies any access to plaintiffs' book,] ^{2/} it can, from such facts, reasonably infer access. It follows that, as credibility is unavoidably involved, a genuine issue of material fact presents itself. With credibility a vital factor, plaintiff is entitled to a trial where the jury can observe the witnesses while testifying. Plaintiff must not be deprived of the invaluable privilege of cross-examining the defendant--the "crucial test of credibility"--in the presence of the jury. ^{3/} Plaintiff, or a lawyer on his behalf, on such examination may elicit damaging admissions from defendant; more important, plaintiff may persuade the jury, observing defendant's manner when testifying, that defendant is unworthy of belief.

To be sure, plaintiff examined defendant on deposition. But the right to use depositions for discovery, or for limited purposes at a trial, of course, does not mean that they are to supplant

1. Reyher Affidavit, pp. 4-7.

2. Stone Deposition.

3. Judge Frank's footnote 8. "He would be so entitled if the trial were before a judge without a jury." 154 F.2d at 470.

District Court Opinion Dismissing Defendants' Motion
For Summary Judgment

the right to call and examine the adverse party, if he is available, before the jury. For the demeanor of witnesses is recognized as a highly useful, even if not an infallible, method of ascertaining the truth and accuracy of their narratives. As we have said, "a deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand" for it deprives "of the advantage of having the witness before the jury." It has been said that as "the appearance and manner of the witness" is often "a complete antidote" to what he testifies, "we cannot very well overestimate the importance of having the witness examined and cross-examined in presence of the court and jury." . . .

"The right of a party, therefore, to have a witness subjected to the personal view of the jury, is a valuable right, of which he should not be deprived * * * except by necessity. And that necessity ceases whenever the witness is within the power of the court, and may be produced upon the trial."

With all that in mind, we cannot now say--as we think we must say to sustain a summary judgment--that at the close of a trial the judge could properly direct a verdict. [footnotes omitted]

No more need be said. See also, *Higgins v. Baker*, 309 F.Supp. 635, 637-638 (S.D.N.Y. 1970); *Nordstrom v. Radio Corporation of America*, 251 F.Supp. 41 (D. Colo., 1965); *Harris v. Fawcett Pub., Inc.*, 176

District Court Opinion Dismissing Defendants' Motion
For Summary Judgment

F.Supp. 390, 394 (S.D.N.Y. 1959); MacDonald v.
DuMaurier. 75 F.Supp. 653, 654 (S.D.N.Y. 1946);
6 J. Moore, Moore's Federal Practice, ¶56.17 [14],
at pp. 2515-2519 (1972); Nimmer, supra, §138.

The defendants' brief on the motion contains
a series of interesting arguments on the merits of this
case; these arguments must properly await another day.
After a full plenary trial the court will resolve the
merits of the instant action according to the facts
proved and the applicable law, and it is then that
the arguments herein advanced by the defendants should
be made.

The papers submitted on the instant motion
evidence the completion of substantial pre-trial dis-
covery and, therefore, the court directs that the
instant action be placed on the court's Ready Calendar
fifteen (15) days from the date of this memorandum.

Defendants' motion for summary judgment,
pursuant to Fed. R. Civ. P. 56(b), is denied.

So ordered.

/s/ JOHN M. CANNELLA
U. S. D. J.

Dated: New York, N.Y.
January 25 1974

COMPLAINT

[Same Title]

C O M P L A I N TFIRST CAUSE OF ACTION

1. This action is for copyright infringement, and jurisdiction is based on the Copyright Law of the United States, Act of July 30, 1947, c. 391, 61 Stat. 652, Title 17 of the United States Code, including Sections 101, 112 and 116 thereof, and Title 28 of the United States Code, Sections 1338 (a) and 1400(a).

2. Plaintiffs Rebecca Reyher and Ruth Gannett are citizens of the United States and residents of the State of New York, residing, respectively, at 14 Washington Place East, in the City, County and State of New York and Southern District of New York, and at Cream Hill Road, West Cornwall, in the State of Connecticut. Plaintiff Rebecca Reyher is a writer and author of books, using the name Becky Reyher for authorship and copyright purposes. Plaintiff Ruth Gannett is an illustrator of books.

3. On information and belief, defendant Children's Television Workshop is a corporation of the State of New York, having its principal office and place of business at No. 1

Complaint

Lincoln Plaza, in the City, County and State of New York and Southern District of New York.

4. On information and belief, defendant Tuesday Publications, Inc. is a corporation of the State of Illinois, having an office and place of business at 437 Madison Avenue, in the City, County and State of New York and Southern District of New York. Further on information and belief, defendant Tuesday Publications, Inc. has obtained from the Secretary of State of the State of New York a certificate of authority to do business within the State of New York, and has designated the Secretary of State as its agent upon whom all process in any action or proceeding against it may be served within the State of New York.

5. Prior to August 24, 1945, plaintiffs, who then were and ever since have been citizens of the United States, created, wrote and illustrated an original book entitled "My Mother Is The Most Beautiful Woman In The World", and, on August 24, 1945, plaintiffs published said book in the United States with statutory notice of copyright.

6. Plaintiffs' above identified book contains a large amount of material wholly original with the plaintiffs, and

Complaint

it constitutes copyrightable subject matter under the Copyright Law of the United States.

7. Between August 24, 1945 and September 19, 1945, plaintiffs complied in all respects with the Copyright Law of the United States, Act of July 30, 1947, c. 391, 61 Stat. 652, Title 17 U.S.C., and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said book and received from the Register of Copyrights a certificate of registration dated and identified as follows:

Copyright Registration No. A 189951
Date of Publication August 24, 1945
Copies Received August 28, 1945
Affidavit Received September 19, 1945.

8. A copy of the certificate of registration is hereto annexed and made a part hereof as Exhibit 1. A copy of plaintiffs' copyrighted book is hereby designated and made a part hereof as Exhibit 2, and profert thereof is hereby made.

9. Since August 24, 1945, plaintiffs' copyrighted book has been published by plaintiffs or their publishers, and all copies of said book made by plaintiffs or under their authority

Complaint

or license have been printed, bound and published in strict conformity with the provisions of the Act of July 30, 1947, c. 391, 61 Stat. 652 and all other laws governing copyright.

10. Since August 24, 1945, plaintiffs' copyrighted book has also been published, under the same title, in the form of a copyrighted motion picture, all under the authority and license of the plaintiffs, and in strict conformity with the provisions of the Act of July 30, 1947, c. 391, 61 Stat. 652.

11. Since August 24, 1945, plaintiffs have been and they still are the sole proprietors of all right, title and interest in and to the copyright in said book, and since September 19, 1945, plaintiffs have been and they still are the sole proprietors of all right, title and interest in and to said Copyright Registration No. A 189951.

12. On information and belief, at a time subsequent to August 24, 1945, defendants Children's Television Workshop and Tuesday Publications, Inc. commenced to infringe plaintiffs' said copyright by publishing and widely circulating, under the title "The Most Beautiful Woman In The World", an illustrated short story which was copied from plaintiffs' said copyrighted book.

Complaint

Defendants' publication of said infringing short story was without plaintiffs' knowledge or consent. A copy of defendants' infringing short story is annexed hereto as Exhibit 3 and made a part hereof.

13. Promptly upon their discovery of the infringement, plaintiffs notified defendant Tuesday Publications, Inc. thereof, and demanded cessation of publication of the infringing short story. A copy of the notice of infringement, dated October 26, 1971, is annexed hereto as Exhibit 4 and made a part hereof.

14. On information and belief, defendant Tuesday Publications, Inc. forwarded said notice of infringement to defendant Children's Television Workshop and the latter defendant responded to said notice of infringement on behalf of both defendants, and rejected plaintiffs' claim of copyright infringement. A copy of said response dated November 10, 1971 is hereto annexed as Exhibit 5 and made a part hereof.

15. On information and belief, defendants are continuing to infringe plaintiffs' copyright, by continuing to publish and circulate said infringing short story, to plaintiffs' irreparable damage and injury.

Complaint

SECOND CAUSE OF ACTION

16. Plaintiffs repeat and reallege the allegations of the First Cause of Action.

17. On information and belief, at a time subsequent to August 24, 1945, defendant Children's Television Workshop commenced to infringe plaintiffs' copyright in suit by producing, performing, taping and televising, without plaintiffs' knowledge or authorization, a television production entitled "The Most Beautiful Woman In The World" and copied from plaintiffs' copyrighted book.

18. Plaintiffs have no knowledge or information as to whether said television infringement commenced prior or subsequent to the date of plaintiffs' notice of infringement, namely, October 26, 1971, but, on information and belief, the infringing production was performed and televised by defendant Children's Television Workshop on more than one occasion since that date.

19. On information and belief, defendant Children's Television Workshop is continuing to infringe plaintiffs' copyright by continuing to perform and televise said infringing television production, to plaintiffs' great and irreparable damage and injury.

Complaint

WHEREFORE, plaintiffs respectfully demand judgment against both defendants under the first cause of action and against defendant Children's Television Workshop under the second cause of action, as follows:

(a) That defendants Children's Television Workshop and Tuesday Publications, Inc., their officers, agents and employees and all others acting in concert or under contract with defendants or either of them, be enjoined, during the pendency of this action and permanently thereafter, from infringing plaintiffs' copyright and Copyright Registration No. A 189951, and from publishing, selling, distributing or otherwise circulating their illustrated short story entitled "The Most Beautiful Woman In The World".

(b) That defendant Children's Television Workshop, its officers, agents and employees, and all others acting in concert or under contract with said defendant, be enjoined, during the pendency of this action and permanently thereafter, from infringing plaintiffs' copyright and Copyright Registration No. A 189951 by performing and television its television production "The Most Beautiful Woman In The World".

Complaint

(c) That defendants be required to pay to plaintiffs such damages as plaintiffs have sustained in consequence of defendants' infringement of plaintiffs' said copyright and Copyright Registration No. A 189951, and to account for all gains, profits and advantages derived by defendants from said infringement, or such damages as to the Court shall appear just and proper, but not less than the statutory damages provided in 17 U.S.C. 101.

(d) That defendants be required to deliver up to be impounded during the pendency of this action, and to be destroyed thereafter, all copies, tapes and prints, in their possession or under their control, of said infringing short story and said infringing television production, both entitled "The Most Beautiful Woman In The World", together with all printing plates, film negatives and other master printing means for making such infringing copies, tapes and prints.

(e) That defendants pay to plaintiffs the costs of this action and reasonable attorney fees to be allowed to the plaintiffs by the Court.

(f) That plaintiffs have such other and further relief as may be appropriate.

Dated: February 7, 1972.

ANSWER

[Same Title]

Defendants, Children's Television Workshop ("CTW") and Tuesday Publications, Inc. ("TPI"), answering plaintiff's complaint, respectfully allege:

Answering the First Cause of Action

1. Deny each and every allegation set forth in paragraph "1." of the complaint, except admit, on information and belief, that plaintiffs claim infringement of statutory copyright in and to a work entitled "My Mother Is The Most Beautiful Woman In The World" under provisions of Title 17 U.S.C. 1 et seq.
2. Deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraphs "2.", "5.", "6.", "7.", "9.", "10." and "11." of the complaint.
3. Deny each and every allegation set forth in paragraph "3." of the complaint, except admit that defendant CTW is incorporated by the Regents of the State University of New York under the Education Law of the State of New York and maintains its principal office and place of business at 1 Lincoln Plaza, City, County and State of New York, within the Southern District of New York.

Answer

4. Admit the allegations set forth in paragraph "4." of the complaint.

5. Deny each and every allegation set forth in paragraph "8." of the complaint, except admit that what purports to be a copy of a certificate of registration of a claim to copyright No. 189951 is annexed to the complaint as "Exhibit 1."

6. Deny each and every allegation set forth in paragraph "12." of the complaint, except admit that defendant CTW allowed TPI to publish, without the consent of the plaintiffs, a short story entitled "The Most Beautiful Woman in the World", a copy of which is annexed to the complaint as "Exhibit 3."

7. Deny each and every allegation set forth in paragraph "13." of the complaint, except admit receipt by defendant TPI of a letter, dated October 26, 1971, of which "Exhibit 4." annexed to the complaint purports to be a copy.

8. Deny each and every allegation set forth in paragraph "14." of the complaint, except admit that defendant CTW rejected plaintiffs' claims in a letter dated November 10, 1971, of which "Exhibit 5." annexed to the complaint purports to be a re-typed copy.

9. Deny each and every allegation set forth in paragraph "15." of the complaint.

Answer

Answering the Second Cause of Action

10. In response to paragraph "16." of the complaint, defendants repeat and reallege each and every admission and denial set forth in paragraphs "1." through "9." of this answer with the same force and effect as if set forth herein at length.

11. Deny each and every allegation set forth in paragraph "17." of the complaint, except admit that defendant CTW produced and broadcast, without the authorization of the plaintiffs, a segment of an episode of the television program "Sesame Street" containing the sentence "my mother is the most beautiful woman in the world".

12. Deny each and every allegation set forth in paragraphs "18." and "19." of the complaint.

For a First Defense

13. The complaint fails to set forth a claim upon which relief may be granted.

For a Second Defense

14. On information and belief, plaintiffs are precluded from maintaining the instant claims under provisions of Title 17 U.S.C. § 7, 8 and 13.

WHEREFORE, defendants demand judgment dismissing plaintiffs' complaint together with the costs and disbursements of this action and reasonable counsel fees.

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2 If Stone did infringe, it follows that the others
3 did infringe. But if Stone didn't infringe, the others
4 didn't infringe. Mr. Stone will be available to testify
5 here as to what he did in creating the television segment
6 that was used.

7 Your Honor, what we have here is a case where for
8 the plaintiff to succeed it is going to have to be a double
9 circumstantial evidence case because to prove copying through
10 access alone is at best circumstantial. So you are going
11 to have one circumstantial bit of evidence on top of another
12 circumstantial bit of evidence. When you have Stone's denials
13 that he didn't copy -- and you will look at the two works
14 and see no copying whatsoever, the only copying is the same
15 basic Russian tale which is the story line, which I can boil
16 down to six sentences. It is the story of a child lost,
17 found by strangers.

18 "Where is your mother?

19 "I don't know.

20 "Who is your mother?

21 "She's the most beautiful woman in the world."

22 The villagers say, "We'll just look for the most
23 beautiful woman in the neighboring villages." And each time
24 the child says, "No, she's more beautiful than that."

25 Finally she pushes her way into a circle and says,

If Stone did infringe, it follows that the others did infringe. But if Stone didn't infringe, the others didn't infringe. Mr. Stone will be available to testify here as to what he did in creating the television segment that was used.

Your Honor, what we have here is a case where for the plaintiff to succeed it is going to have to be a double circumstantial evidence case because to prove copying through access alone is at best circumstantial. So you are going to have one circumstantial bit of evidence on top of another circumstantial bit of evidence. When you have Stone's denial that he didn't copy -- and you will look at the two works and see no copying whatsoever, the only copying is the same basic Russian tale which is the story line, which I can boil down to six sentences. It is the story of a child lost, found by strangers.

"Where is your mother?"

"I don't know."

"Who is your mother?"

"She's the most beautiful woman in the world."

The villagers say, "We'll just look for the most beautiful woman in the neighboring villages." And each time the child says, "No, she's more beautiful than that."

Finally she pushes her way into a circle and says,

EXPERT DESCRIBES REMARKABLE SIMILARITIES
BETWEEN DEFENDANTS' AND PLAINTIFFS' DRAWINGS

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Erdell-Direct

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and ask you if this is a copy that we obtained for you?

A Yes.

MR. GIRDEN: Your Honor, what is the relevancy of a patent they may have obtained for this witness?

THE COURT: Sustained. Mark it for identification.

MR. S. STOLL: Let us mark this 23 for identification.

(Plaintiffs' Exhibit 23 marked for identification.)

Q Professor Erdell, I show you two exhibits, namely, Plaintiffs' Exhibits 17A and 17B, and I tell you -- and this is something for you to assume in connection with this question series of questions -- that Exhibit 17A is an illustration taken from a book written by one of the plaintiffs and illustrated by one of the plaintiffs and published in 1945. And Exhibit 17B is an illustration taken from one of the defendant's publications, published in 1971. So that for purposes of our examination here the prior published illustration is 17A, Plaintiffs', and the subsequent published illustration is 17B, which is Defendants'.

And I ask you to compare the two illustrations and compare the appearance, compare the positioning, the action, and so on, as between the two illustrations.

A I will try. The attitude of the two characters in each illustration are the same. The mother comes from the

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MR. GARDEN: Your Honor, I object to this as

SIMILARITIES CANNOT BE EXPLAINED
BY COINCIDENCE

1 T-55

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A-35

2 THE COURT: Well, if you can answer yes or no
3 that would be delightful.

4 A I have to refer again to 30 years of experience
5 looking at art work daily that I have never seen a coinci-
6 dence like this, no.

7 MR. GIRDEN: I object to the answer as not respon-
8 sive, except for the last sentence.

9 THE COURT: We will assume the answer is "no."

10 MR. GIRDEN: Same objection.

11 MR. S. STOLL: No further questions, your Honor.

12 MR. GIRDEN: I have no questions, your Honor.

13 (Fitness Excused)

14 (Recess)

15 A L I C E M A C H O W, called as a witness by
16 the plaintiff, having been first duly sworn, was
17 examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. R. STOLL:

20 Q What is your residence address?

21 A 320 West 22nd Street, New York.

22 Q Mrs. Macilow, what is your profession?

23 A I am a teacher of physics and mathematics. I have
24 been an assistant professor at Montclair State College. I
25 am now teaching part time as an adjunct as a part of the City

PLAINTIFF REYHER HEARD STORY ONLY FROM
HER MOTHER

1 T-69 Reyher-Direct A-36

2 on top and it was translated into French. Those are the two

3 paperbacks.

4 Q Originally it was hard-covered?

5 A Yes, published by Columbia University Press.

6 Q And the other book --

7 A "The Fox and His Hundred Wives" was published by

8 Doubleday.

9 Q Only in hard cover?

10 A Only in hard cover.

11 Q Mrs. Reyher, to get to the subject of this suit,

12 which is your book entitled "My Mother is the Most Beautiful

13 Woman in the World," I understand from what you already

14 said and written in some of the papers filed in this court

15 that the original folktale as heard by you was told by your

16 mother, is that correct?

17 A Yes, it is.

18 Q All right. Now, let me ask you this: did you

19 hear it from anyone other than your mother?

20 A Never.

21 Q Did you see it anywhere in print?

22 A Never.

23 Q In any form at all?

24 A Never.

25 Q So that your sole source was your mother?

PLAINTIFF DID NOT KNOW OF OWN KNOWLEDGE
THAT STORY SHE HEARD WAS A FOLKTALE

1 T-70 Keyher-Direct A-37

2 A Yes.

3 Q Is your mother alive?

4 A She's been dead quite a few years.

5 Q Do you know of your own knowledge that this
6 story which was told to you by your mother was a folktale
7 told by others to others in the Ukraine or anywhere else?

8 A I only know that my mother heard this story in
9 the Ukraine as a child where she was born in a small town
10 and it was a localized story.

11 Q Well, did your mother tell you that she heard it
12 from someone, or did you --

13 A I assumed she heard it from someone. I assumed
14 that she heard it in her community either from her mother or
15 from someone else.

16 MR. GIRDEN: I object to the conclusion, the
17 assumption, your Honor.

18 THE COURT: Yes, strike it out.

19 Q You don't know of your own knowledge that she heard
20 it from her mother or from someone else in the community?

21 A I am a little confused. I heard it --

22 Q Of your own knowledge, did you hear anybody else
23 tell it to your mother?

24 A I only heard it from my mother.

25 Q So you don't know of your own knowledge where she

PLAINTIFF DID NOT KNOW OF OWN KNOWLEDGE
THAT STORY SHE HEARD WAS A FOLKTALE

1 T-71 Reyher-Direct A-38
2 heard it or from whom, if at all?
3 A Of my own knowledge?
4 Q That's correct, of your own knowledge.
5 A No.
6 Q You do not know?
7 A No.
8 Q So you do not know of your own knowledge that this
9 was a folktale told from mother to child, or anyone else,
10 in any other way in the Ukraine, or anywhere else?
11 A I only know it was one of the stories my mother
12 told me and she told me a great many.
13 Q All right. In what language did your mother tell you
14 that story?
15 A She told it to me in Russian. And I would like
16 to interpose that I only spoke Russian until I was five,
17 except for a very few words that I spoke to my Negro nurse.
18 Q When you wrote your book, you wrote it, I take it,
19 in the English language?
20 A Yes.
21 Q Did that require a translation of what you had
22 heard from your mother?
23 A It not only required a translation, it required
24 two volumes of a Russian dictionary to check certain words
25 and impressions that I had because this was an impression rather

PLAINTIFF DID NOT KNOW OF OWN KNOWLEDGE
THAT STORY SHE HEARD WAS A FOLKTALE

1 T-72

Keyher-Direct

A-39

2 than a literal translation. Anything that I used that she
3 had told me might have been a translation, but it also was
4 primarily a mood and mine was an interpretation.

5 Q Well, would you say that your copyrighted book in
6 suit is a literal translation of what you heard from your
7 mother?

8 A Not at all.

9 Q And in what way does it differ from what your mother
10 told you?

11 A Could I just say something here and interpose
12 something about the title and what my mother told me?

13 Q All right, as an illustration let us refer to the
14 title.

15 A The title of the book which the judge has and which
16 you have as an exhibit is "My Mother is the Most Beautiful
17 Woman in the World."

18 Q That is the title you gave the book?

19 A That's the title I gave. This was the theme.
20 This was not the title of the Russian story my mother told
21 me from which I retold and adapted my story.

22 The title and the theme of the book as my mother
23 told it to me translated into English would be "My mama is
24 the most beautiful in the whole world,"

25 In Russian but written phonetically in

PLAINTIFF REYHER'S WORK INVOLVED
HER OWN ORIGINAL INPUT

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English, that is, that would have been moya mamma -- same as
ours -- samaya, the most.

Q Spelled how?

A S-A-M-A-Y-A, the most.

Beautiful, kracyvoya, the letter V which means in,
best, veyz miri, world. "My mama is the most beautiful in
the whole world" would be the literal translation in English.

The order of the words is the same as in English,
"My mama is the most beautiful in the whole world" in Russian.

A Russian peasant child does not use the formal
"mother" or maj which is the Russian word for mother.

Q How do you spell that?

A M-A-J, but the Russians have what they call a soft
sign so it's maj.

MR. GIRDEN: I have no objection to the witness
and the plaintiff reading it into the test, only if we know
what she's reading from.

THE WITNESS: I have to have notes.

MR. GIRDEN: Were these notes prepared by you?

THE WITNESS: I typed them so I could read faster.

I use the word "mother" in my title because it's
in common American usage and we have glorified mother with
Mother's Day and other recognition. I added woman for importance
rhythm and breadth, but the title of the story originates with

PLAINTIFF REYHER'S WORK INVOLVED
HER OWN ORIGINAL INPUT

1 T-74

Reyher-Direct

A-41

2 me.

3 Q In other words, you substituted the word "mother"
4 for mama?

5 A Yes.

6 Q And you added the word "woman," which was not in
7 the title as you heard it?

8 A Yes, and I dropped "whole."

9 Q And you dropped "whole," W-H-O-L-E, "whole world"?

10 A Yes.

11 Q Was that indicative of the way in which you changed
12 the story that you heard your mother tell you?

13 MR. GIRDEN: Objection, your Honor.

14 THE COURT: Sustained.

15 A I can only indicate the changes I made as we go
16 along.

17 Q Please.

18 A I'm sorry.

19 Q Mrs. Reyher, the title of defendants' story in
20 Sesame Street magazine and also in Tuesday at Home is "The
21 Most Beautiful Woman in the World."

22 Now, if the author of defendants' story had listened
23 to your mother tell the story and had used your mother's
24 words, translated into English, of course, would this title
25 have been used?

PLAINTIFF REYHER'S WORK INVOLVED
HER OWN ORIGINAL INPUT

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Reyher-Direct

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2 MR. GIRDEN: Objection, your Honor.

3 THE COURT: Sustained.

4 Q Does this title "The Most Beautiful Woman in the
5 World" correspond to the title which was given to the story
6 by your mother?

7 MR. GIRDEN: Objection, your Honor.

8 THE COURT: Sustained.

9 Q To your knowledge, was there any folktale told
10 anywhere and by anybody, except your mother to you, having
11 the title "The Most Beautiful Woman in the World"?

12 A No, and I have studied folktales and I have studied
13 stories in various parts of the world. I never heard a
14 story of this title or this theme or read it anywhere.

15 Q Mrs. Reyher, let us go to the beginning of your
16 story and compare it with the beginning of the Sesame Street
17 story, but with particular reference to the story as it was
18 told on the Sesame Street program on television.

19 Just a moment, let me get my copy. Let me refer
20 you to Plaintiffs' Exhibit 12 which is the script of the
21 television segment produced and broadcast by Sesame Street.
22 and that is this.

23 MR. GIRDEN: Your Honor, Plaintiffs' Exhibit 6 is not
24 the transcript as broadcast and could not constitute a
25 representation of the alleged infringing work.

PLAINTIFF REYHER'S WORK INVOLVED
HER OWN ORIGINAL INPUT

1 T-92 Reyher-Direct A-43
2 I said it because it's an American idiom. They
3 would not have brought back, as I did, in the Russian.

4 Q Well --

5 A This is mine.

6 Q Yes. This entire thing that I have just read to you

7 A Well, then, there is the other part that in the
8 Russian book -- I don't mean the Russian book, I mean in the
9 Russian story -- sorry, I am thinking of a book -- they were
10 told, the boys, "Find the most beautiful woman and tell them
11 to come running here instantly."

12 And translated that would mean naydeata, N-A-Y-D-E-E
13 find, samone, S-A-M-O-N-E, most beautiful, kraseevobye, you
14 had it before, K-R-A-S-E-E-V-C-B-Y-E.

15 And then here they use the word "woman" -- bring
16 back the most beautiful woman, Q-H-E-Y-N-S-II-I-N-A, and
17 tell, S-K-A-G-H-E-E-T-T-E-E, tell them, which is Y-E-M-S-H-T-O
18 that they, which is O-N-E-F, seechaz, which means immediately,
19 S-E-E-C-H-A-S, suda, here, begnalle which means come running,
20 B-E-G-H-A-L-L-E.

21 So that in the Russian, as I remembered it vaguely,
22 the phrase was "Find the most beautiful woman and tell them
23 to come running here instantly." There is no question of this
24 abrupt "bring back woman." That was mine to make it sound
25 American.

PLAINTIFF REYHER'S WORK INVOLVED
HER OWN ORIGINAL INPUT

1 T-93

Reyner-Direct

A-44

2 Q Taking the next page of your notes and page 26 of
3 your book, let me read the following:

4 "As each beautiful woman came rushing up, blushing
5 and proud that she had been so chosen, Kolya would say to
6 her: 'We have a little lost one here. Stand back everyone,
7 while the little one tells us if this is her mother!'"

8 There is one other sentence I would like to read
9 to you and this comes from page 27 of your book:

10 "As she looked at each strange woman, Varya shook
11 her head in disappointment and sobbed harder."

12 I ask you whether these sentences I have just
13 read to you are yours or your mother's?

14 A They are mine.

15 Q Do you recall your mother's sentences that would
16 correspond to these?

17 A No, I do not.

18 Q And the next page from your notes and page 27 of your
19 book:

20 "Soon every known beauty from far and near, from
21 distances much further than a child could have strayed, had
22 come and gone. Not one of them was Varya's mother."

23 I ask you, was this your language or your mother's?

24 A This is my language with the exception of the last
25 sentence which is a negative sentence, and I used it and so did

PLAINTIFF REYHER'S WORK INVOLVED
HER OWN ORIGINAL INPUT

1 T-94

Reyher-Direct

A-45

2 the defendants. And that sentence was, "Not one of them was
3 Varya's mother," which is a typical negative and in Russian
4 it would be nye odna, N-Y-E and then O-D-HA, not one. And
5 then bila, B-I-L-A, was Varya's mother. That negative form
6 was the Russian form, as I recognized it, and the defendants
7 used that saying, "And none of them was Varya's mother."
8 It's not an American idiom. It was the Russian.

9 Q Would your mother have used the Russian equivalent
10 of the word "mother"?

11 A Never.

12 Q So that was your word as well?

13 A Yes.

14 Q The next page of your notes and page 27 of your
15 book --

16 A Pardon me, if we could just go back to page -- we
17 just finished with the mother, is that right?

18 Q With this?

19 A So we are now on page nine of my notes.

20 Q This comes from page 27 of your book:

21 "Soon every known beauty from far and near, from
22 distances much further" -- I have already done that, I'm
23 sorry.

24 This is page 27:

25 "The villagers were really worried. They shook

PLAINTIFF REYHER'S WORK INVOLVED
HER OWN ORIGINAL INPUT

1 T-95 Reyher-Direct A-46

2 their heads. Kolya spoke to them. 'One of us will have

3 to take the little one home for the night. Tomorrow may bring

4 fresh wisdom to guide us!'"

5 Now, I ask you, is that your language or your

6 mother's?

7 A That's my language and I put in "shook their heads"

8 because I thought it was vivid and dramatic, but normally

9 when people are worried they raise their eyebrows or pucker

10 their foreheads, they don't shake, but I did it to make it

11 more dramatic.

12 Q But this is not your mother's language, is it?

13 A No, as far as I can remember, not, but the Russian

14 is a Russian expression, "shook their heads" in Russian

15 would mean pockachalee, P-C-C-K-A-C-H-A-L-E-E, rocked, and

16 E-E-S, here, and head is gove, G-O-V-E.

17 I just remember that expression from my childhood.

18 They copied it.

19 Q Did your mother say this in this part of the story?

20 A No, she didn't.

21 MR. GIRDEN: I object to so much of the answer as

22 says, "They copied it." That's a conclusion of the witness.

23 THE WITNESS: Sorry, I won't do it again.

24 Q The next page of your notes from page 28 of your

25 book. Let me read it to you:

PLAINTIFF REYHER'S WORK INVOLVED
HER OWN ORIGINAL INPUT

1 T-96

Reyher-Direct

A-47

2 "Just then a breathless, excited woman came puffing
3 up to the crowd. Her face was big and broad, and her body
4 was even larger. Her eyes were little pale slits between
5 a great lump of a nose. The mouth was almost toothless.
6 Even as a young girl everyone had said, 'A homely girl like
7 Marfa, M-A-R-F-A, is lucky to get a good husband like Ivan.'"

8 "'Baryachka,' cried the woman.

9 "'Mamochka,' cried the little girl, and they fell
10 into each other's arms. The two of them beamed upon each
11 other. Varya cuddled into that ample and familiar bosom."

12 Now, Mrs. Reyher, I ask you whether this was your
13 language or your mother's?

14 A This was mostly -- almost entirely my language and
15 I will start with my phrase, "Just then a breathless, excited
16 woman came puffing up to the crowd." In the Russian story,
17 as I could recall it, it started, "At that moment --
18 vot atot -- at that moment -- meenoot -- suddenly -- vdrug,
19 V-D-R-U-G, vistopeela, V-I-S-I-O-P-E-E-L-A-- came out or
20 suddenly appeared a woman, ghaynshchina.

21 That story as I can recall it started, as I heard
22 it originally, "At that moment suddenly a woman appeared."

23 Now, in order to make it -- and then it went on
24 that once, O-N-E-E -- they didn't know -- neznaee, N-E-Z-I-A-I
25 nor had ever seen before -- neekogda, N-E-E-K-O-G-D-A --

PLAINTIFF REYHER'S WORK INVOLVED
HER OWN ORIGINAL INPUT

1 T-97 Reyher-Direct A-48
2 before, ranshee, R-A-N- -E-E, had seen nyevedelie,
3 N-Y-E-V-E-E-D-E-L-I-E, ona -- she was -- bila, B-I-L-A,
4 sak, T-A-K, which means so upset, R-O-S-T-O-Y-N-A, upset.
5 Ona, O-N-A, she. Not, H-Y-E. Mogla, could, M-O-G-L-A,
6 dooshat, D-O-O-S-H-A-T, breathe, which might mean could
7 breathe or could almost breathe.

8 So that that part in the Russian was, "At that moment
9 suddenly appeared a woman they didn't know nor had ever seen
10 before. She was so upset she could not breathe." And I,
11 to make it more colloquial and more American, described her
12 as breathless, a breathless, excited woman puffed up --
13 puffing up to the crowd because American children know a
14 crowd has drama. There was no crowd. I want to be sure
15 and bring that in in the Russian story spelled out, I want
16 to get to that. I used "crowd" because it instantly denotes
17 drama to the American children.

18 In the story as told to me, the woman appeared
19 before the people in the clearing. Crowds are illegal
20 under the Soviets and were under the Czar. More than ten
21 people gathered together except in an emergency are suspect.
22 Crowds would never have been used in a Russian story. I
23 used it and it was used by the defendants.

24 I began the scene with "Just then," and so did the
25 defendants.

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THE COURT: Sustained as to form.

PLAINTIFF REYHER'S WORK INVOLVED
HER OWN ORIGINAL INPUT

1 T-99 Reyher-Direct A-50

2 Q Would your mother or did your mother when she
3 told the story to you say, "This is my mother"?

4 A My mother would always have referred to "My mama"
5 or "by mamochka" in her story. She would never have used the
6 word "mother".

7 Q And that would be true, would it, with respect to
8 the first part of the sentence, "All of the villagers smiled
9 thankfully when Varya looked up from her mother's shoulder and
10 said with joy:" -- your mother didn't say, did she, "looked
11 up from her mother's shoulder"?

12 A It would have been referred to as her mother, but
13 in referring specifically to the child's mother they would
14 have referred to the child's mama.

15 Q Please turn to the next page of your notes and
16 that would come from page 30 of your book. Let me read it:

17 "The group of friends and neighbors, too, beamed
18 upon each other as Kolya repeated the proverb so well known
19 to them, a proverb which little Varya had just proved: 'We
20 do not love people because they are beautiful, but they seem
21 beautiful to us because we love them.'"

22 And I ask you, is this your language or your
23 mother's?

24 A This is my language.

25 Q Do you recall your mother's language?

PLAINTIFFS' PRIZE-WINNING BOOK

1 T-100

Reyher-Direct

A-51

2 A No, I do not.

3 MR. S. STOLL: Your Honor, I don't want to ask
4 this witness to compare her language with the corresponding
5 language of the defendants because I think that perhaps an
6 objection will be made and perhaps sustained that these
7 things speak for themselves. So in lieu of that, I would
8 like to suggest to your Honor that the respective passages from
9 both works are contained in Plaintiffs' Exhibit 15, the
10 ones that I read to Mrs. Reyher, and they are there together
11 with the corresponding passages from defendants' works.

12 MR. GIRDEN: Your Honor, at this time I would
13 like to move to strike Exhibit 15 on the basis of no
14 connection.

15 THE COURT: Overruled.

16 Q Mrs. Reyher, on the book which we have marked as
17 Plaintiffs' Exhibit 3, that is, your copyrighted book in
18 suit, there is what appears to be a label or seal which
19 reads Caldecott, C-A-L-D-E-C-O-T-T. Can you tell the Court
20 what that signifies?

21 A Each year the Library Association and various
22 groups of librarians form different organizations and the
23 "Hornr Book," which is the definitive book about children's
24 literature, awards a prize. The prize is either the Newberry
25 prize or the Caldecott prize, and they award a prize and then

PLAINTIFFS' PRIZE-WINNING BOOK

1 T-101 Reyher-Direct A-52

2 they have four runners-up for the honor and this book and
3 illustrations was a runner-up for the Caldecott prize and I
4 can't recall the exact year. It was in the late '60s, but
5 it was in some of the material I have given you, Mr. Stoll,

6 Q Your book was published when?

7 A 1945.

8 Q And the original copyright has expired, hasn't it,
9 and the renewal is now in effect; isn't that so?

10 A Yes.

11 Q So that the book has had an existence of 23 years
12 plus the additional time since renewal, is that correct?

13 A Yes, except that it changed publishers. The
14 first publisher went out of existence and there is the hiatus
15 between the two publishers and I can't recall just how long.

16 Q How many printings did this book experience?

17 A Well, it's not in the past tense, it's in the present
18 tense. It is presently in its twelfth printing.

19 Q Has your story been published in other publications
20 with your authorization?

21 A A great many. Am I allowed to intercede how many
22 copies of the book have been sold?

23 MR. GIRDEN. Your Honor, can we please have questions
24 and answers?

25 THE COURT: Yes. You can do that after you get off

COMMENDATION FOR PLAINTIFFS' BOOK

1 T-104

Reyher-Direct

A-53

2 A Yes, it was.

3 MR. S. STOLL: I ask that this excerpt be marked
4 in evidence as Plaintiffs' Exhibit 25. This is a copy that
5 you have already seen.

6 MR. GIRDEN: I object, your Honor, as not the
7 best evidence.

8 THE COURT: Well, it isn't. Sustained.

9 Mark it for identification.

10 (Plaintiffs' Exhibit 25 marked for identification.)

11 Q Mrs. Reyher, has your book been used in the school
12 library program for children in a depressed area?

13 A Yes, in the '60s when the school system here in
14 New York was beginning to be aware of the need of materials
15 for good race relations, they introduced my book as one of
16 the five books and one of the only two books written by a
17 white person because of its universal theme as something
18 to study to unite all children together and a report of that
19 was written, because it was such a successful program called
20 "The School Library Program for Children in Depressed Areas,"
21 and it was written by two black librarians and members of
22 this particular group that instituted the study. One of
23 them was Harriet Brown and the other was Elinor, E-L-I N-O-R,
24 D. Sinnette, S-I-N-N-E-T-T-E, and it was published in the
25 American Library Association Bulletin of

PLAINTIFF REYHER'S WORK INVOLVED
HER OWN ORIGINAL INPUT

1 T-127

Reyher-Cross

A-54

2 phrase, "In the Ukraine the villagers were all busy cutting
3 and gathering the wheat."

4 Q I read that sentence. Other than that sentence.

5 A Just half a minute. I said that Russian children
6 didn't have to be told that everybody was out in the field
7 and in the defendants' paragraph they copied that. Or am I
8 not permitted to say?

9 Q My question is, other than that first sentence
10 going all the way through, do you claim that any other portion
11 of your page one has been textually duplicated in any of the
12 defendants' publications?

13 THE COURT: In other words, he starts with, "Marfa
14 and Ivan."

15 MR. GIRDEN: "This is the land."

16 A In paragraph two of my book, the middle sentence,
17 "Whenever one went to the fields in harvesttime." That is
18 what I was saying to you. Russian children do not have to
19 be told in a Russian village that everybody went to the fields
20 I put that in to give character to it. And they copied it.

21 Q Where did they copy it, that's my question.

22 A All right, that's what I am going to get. You
23 asked me to and I have to get copies of it.

24 In the first paragraph of the Sesame Street story
25 it says, "Once upon a time, long ago, all the people of a

PLAINTIFF REYHER'S WORK INVOLVED
HER OWN ORIGINAL INPUT

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T-128

Reyher-Cross

A-55

certain village were out working in the fields." That is a duplication of my saying that everybody was out in the fields.

Q You said that in your first sentence, "The villagers were all busy cutting and gathering the wheat."

A All right, and they say it in their sentence, "Once upon a time, long long ago, all the people in a certain village were out working in the fields." That's a definite copying of words, mood, locale and type of story. And I have some more in that paragraph if you are ready for it.

Q I am asking for duplication of literary expression, not of ideas or concepts.

A Well, I would certainly say that the phrase, "The villagers were all busy cutting and gathering the wheat," which is my phrase, is practically identical with, "Were out working in the fields."

Q You testified to that.

A In that sentence, the last sentence of that paragraph they say, "Finally one of them found a little boy at the edge of the field."

THE COURT: We are still on the first page.

THE WITNESS: Yes, of the book.

THE COURT: The gathering of wheat. Now, the next sentence reads, "For this is the land from which most Russians

PLAINTIFF REYHER'S WORK INVOLVED
HER OWN ORIGINAL INPUT

1 T-134

Reyher-Cross

A-56

2 paragraph and I use it here for the first time to start a
3 sentence on page 24.

4 Q Is it used in the same context?

5 A Now, I want to explain that if one were carrying
6 out the theme and the style -- you are talking about literary
7 comparisons of this story -- one would use "At long last"
8 or "At last." One would not use the word "finally." Three
9 different times the defendants used the word "finally" to
10 start a sentence as I have done on page 24, which is the
11 Russian word nakonets, N-A-K-O-N-E-T-S. I liked it because
12 it was cryptic and dramatic and so I introduced it in the
13 story. It doesn't belong to the style of the story. And I
14 claim they used it in their story beginning with the first
15 paragraph several times because I had used it.

16 Q And you claim the use of the word "finally" to
17 begin a paragraph is unique to Rebecca Reyher, is that
18 correct?

19 A It's unique to a story of this temper and style
20 rather than "At last" or "At long last."

21 Q Going back to page 24, is there anything else on
22 page 24 which you claim is duplicative in literary expression?

23 A Yes, I do. The last sentence of, "Now we have some-
24 thing to go on." I say, I conclude, "This lost child and
25 the people."

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A-57

5 Q You claim it's the copying of a literary expression?

8 Q Is there anything on the next page? I assume it's
9 25 --

11 Q -- "Called to one boy... and he called to still
12 another boy." Where is that copied in defendants' alleged
13 infringing work?

15 Q "Bring Katya, Manya, Vyera, Nadya,' the tall man
16 called to one boy. 'Ay, but don't forget the beauty, Lisa,'
17 he called to still another boy."

19 O I assume your page 25.

Q Turning to page 26, "The women came running. There were orders from Kilya, the village leader."

25 A On page 26, would you ask me that again, please?

PLAINTIFF DID NOT KNOW OF OWN KNOWLEDGE
THAT STORY SHE HEARD WAS A FOLKTALE

T-147

Reyher-Redirect

A-58

never had them.

MR. GIBDEN: I didn't say the originals or even a copy.

THE COURT: That wasn't the point of his inquiry at all. The point of his inquiry was, to get the admission which she finally made, that this was a Russian folk story which she heard from her mother.

MR. S. STOLL: It didn't appear so from his question

THE COURT: That was the inference I got from it and she did tell me that was the case.

Q With respect to that series of questions I want you to focus on the basic question of whether you know of your own knowledge that the story you heard from your mother was, in fact, a Russian folktale known to others than your mother.

A I have only assumed that.

Q But you don't know it of your own knowledge?

A No, I only know it as my mother's story that she told me in my childhood. It's one of my childhood stories.

Q And other than that, you cannot characterize it as a folktale, Russian, Ukrainian or anything else?

A No, that's an assumption.

MR. S. STOLL: That is all.

THE COURT: Are you under the impression your mother

PLAINTIFF DID NOT KNOW OF OWN KNOWLEDGE
THAT STORY SHE HEARD WAS A FOLKTALE

1 T-148

Reyher

A-59

2 wrote original stories?

3 THE WITNESS: My mother was not a writer.

4 THE COURT: Or that she made them up?

5 THE WITNESS: My mother frequently did change
6 or make up stories, as she told them to us, because she was
7 a teacher.

8 THE COURT: It's not uncommon in the Ukraine for
9 people to have folk stories that go around from house to house
10 in the villages?

11 THE WITNESS: I don't know enough about it. I
12 couldn't get communication to get there.

13 THE COURT: You know there are folk stories in
14 the world?

15 THE WITNESS: Yes.

16 THE COURT: But there aren't places in the Ukraine
17 like that?

18 THE WITNESS: I don't know too much about the Ukraine

19 THE COURT: All right.

20 Anything else?

21 You may step down.

22 (Witness Excused)

23 Mr. S. STOLL: Now, your Honor, we have no other
24 witnesses, but I should like to read into the record certain
25 statements that appear in the statement pursuant to rule 90 wh

STONE WORKED FOR C.B.S.

1 T-153

Stone-Direct

A-60

2 I am the executive producer and head writer
3 of Sesame Street.

4 Q For what period of time have you been associated
5 with Sesame Street as executive producer and head writer?

6 A As executive producer for the last two years. I was
7 the original head writer and then there was a period of several
8 years in between when there was another gentleman performing
9 that function.

10 Q When did Sesame Street start?

11 A It went on the air in November of 1969.

12 Q Prior to your association with Children's Television
13 Workshop, did you have any experience in the television field,
14 particularly with respect to children's programming?

15 A I was immediately prior to Sesame Street, a free-
16 lance producer producing specials, developing projects for
17 networks.

18 Prior to that, I was the producer of Captain Kangaroo
19 and wrote that program.

20 Q On CBS?

21 A Yes, and I wrote that program, too, for six years.

22 Q In what period of time did you first enter the
23 television field?

24 A January of 1956.

25 Q Have you been continuously in the television field

C.B.S. PRODUCED RECORDING OF
PLAINTIFFS' BOOK

1 T-218 Stone-Cross A-61

2 this presentation?

3 A I don't know.

4 Q How many stations or channels have presented it?

5 MR. GIBDEN: Your Honor, these have all be provided
6 in answers to interrogatories.

7 THE COURT: I don't see the relevance of it at
8 this point. In any event, I have allowed some inquiry of it.
9 It really goes to the element of damages more than anything
10 else.

11 MR. S. STOLL: Could we have this one answered?

12 A I don't know the extent of the Public Broadcast
13 Network at this point. It's probably in the neighborhood
14 of 300 stations.

15 Q Throughout the country?

16 A Yes.

17 Q I show you Plaintiffs' Exhibit 7, which is the
18 BFA record of Mrs. Reyher's story, "My Mother is the
19 Most Beautiful Woman in the World," and I call your attention
20 to the name, BFA's full name. Could you please read it into
21 the record?

22 A "BFA Educational Media, a Division of Columbia
23 Broadcasting System, Inc."

24 Q Does this refresh your recollection at all as to
25 whether you ran across this story by Mrs. Reyher at the time

STONE FIRST HEARD STORY
FIVE YEARS AFTER PLAINTIFFS' PUBLISHED THEIR BOOK

1 T-158 Stone-Direct A-62

2 differing perspective.

3 Q From what period of time in your life do you recall
4 this story?

5 A It was a story that was told to my sister when she
6 was a very young child, and my sister was fifteen years
7 younger than I am, so she was a child. This would have been
8 around 1950 when she was about five years old.

9 Q Approximately 22 to 24 years ago?

10 A Yes, approximately.

11 Q Do you recall hearing this story told to your
12 sister?

13 A Well, I recall the story told at that time. I
14 don't recall specifically who told it to her. It was a favorite
15 of hers. It was almost certainly either my mother or a
16 woman called Mrs. Looney, who was a daily babysitter and
17 helper in our household.

18 Q What did you recall in your memory of the story
19 as you heard it? Approximately 24 years ago.

20 A I remembered the shape of the story as a sort of
21 folktale, fairy tale idea.

22 Q Can you please recite for the record what it is you
23 remembered of the story as you heard it in around 1950?

24 A Well, the story, as best I can recall it some 20
25 odd years later, would be, "Once upon a time, many years ago,"

GERGELY'S VAGUE RECOLLECTION

1 T-239

Gergely-Direct

A-63

2 A On, that I cannot tell you. I am reading folktales
3 and fairy tales ever since I live, for the last sixty years
4 at least.

5 Q Was this associated in your mind as an old folk-
6 tale or folktale or fairy tale that you had read?

7 A That's right.

8 Q But prior to doing your drawings you had never
9 read Plaintiff's Exhibit 3?

10 A No, I didn't.

11 MR. GIRDEN: I have no further questions.

12 CROSS EXAMINATION

13 BY MR. S. STOLL:

14 Q Do you do any work for Children's Television Work-
15 shop at this time?

16 A No.

17 Q When was the last time you worked for them?

18 A This story.

19 Q That story?

20 A Yes.

21 Q And they never called you back?

22 A No.

23 Q You say that you heard this story sometime in
24 the past?

25 A I didn't hear it. I read it.

GERGELY'S VAGUE RECOLLECTION

1 T-240 Gergely Cross A-64

2 Q Oh, you read it?

3 A Yes.

4 Q I see. Where did you read it?

5 A Some book.

6 Q Do you know the name of the book?

7 A No, I don't.

8 Q In what language was it published?

9 A Most probably German.

10 Q And where did you see this book?

11 A Most probably in Vienna.

12 Q When did you see it?

13 A I lived in Vienna from 1920 until 1931.

14 Q So is that the time you would have read this

15 story?

16 A That must have been that time. I cannot swear to
17 you.

18 THE COURT: In your recollection of the story,
19 did it involve Russia?

20 THE WITNESS: The time when I read the story I didn't
21 know. I read these folktales collected from many, many lands,
22 most in German translation. At least 30 or 40 in the
23 original volumes were in one series published in Germany,
24 folktales of different countries each in one volume, Russian,
25 Arabian, Turkish, Hungarian, Serbian, almost every country

GERGELY'S CONTRADICTORY TESTIMONY

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T-243

Gergely-Cross

A-65

A Yes.

Q You left Vienna when, 1931, did you say?

A 1931.

Q You were asked this question:

"Do you recall what language it was in?

"A No, I read Hungarian, German, French,
a little Slovak and a little Italian and English, of course,
and these things are translated into one of these languages."

Now, what is your recollection of the language in
which this particular book was printed in which you read the
story that corresponds to "My Mother is the Most Beautiful
Woman In the World"?

A Well, at that time that deposition was made I was
very vague about it, I had no recollection. Since then I
thought and thought and thought about it and traced it back
probably to that time when I was in Vienna and so it must
have been German language.

Q Didn't you read books in any other language in Vienna?

A I did, but I read that 30 or 40 volume series in
Vienna and that was in German.

Q What kind of series is it?

A There is a publishing house in Germany, a very well
known one, Diederichs Spellar.

Q How do you spell that?

GERGELY'S CONTRADICTORY TESTIMONY

1 T-244 Gergely-Cross A-66

2 A D-I-E-D-E-R-I-C-H-S.

3 Q How do you pronounce it?

4 A Diederichs, there is an "s" at the end.

5 Q That is the publishing house?

6 A That was a publishing house.

7 Q And that was a particular series of books?

8 A A particular series of books which was called

9 Märchen der Weltliterature, M-Ä-R-C-H-S-E-N D-E-R

10 W-E-L-T-L-I-T-E-R-A-T-U-R-E.

11 Q You say that is a well known series of books?

12 A Yes.

13 Q On what subjects?

14 A Fairy tales, folktales. In America it would mean

15 both, fairy tale or folktale.

16 Q Is that series of books in the United States by any

17 chance in the New York Public Library?

18 A I don't know.

19 Q Did you make any effort since this deposition to

20 look it up?

21 A No, I didn't.

22 Q Did you mention this series to the attorneys for

23 Children's Television Workshop?

24 A No, I didn't.

25 Did you mention it to anybody connected with

DEFENDANTS' CONCEDE THAT THERE IS NO OTHER ENGLISH
LANGUAGE VERSION OF STORY

1 T-272

O'Connor-Cross

A-67

2 THE COURT: I don't know how she could bind them
3 in any event. It would be hearsay to some degree. I don't
4 think you have laid a proper foundation to start with.
5 Sustained.

6 Q Do you have any knowledge as to whether a search
7 was conducted at any time to ascertain whether Mrs. Keyher's
8 story had previously been published, that is, published
9 prior to the time of her publication date, 1945?

10 A No, I don't know.

11 Q Who is Roberta Miller?

12 A Roberta Miller is the publisher of the magazine.

13 Q What magazine?

14 A Of Sesame Street magazine.

15 Q Interrogatory 16 of Plaintiffs' third set of
16 interrogatories reads as follows -- I think we have to start
17 with 15:

18 "State whether defendants, or their attorneys,
19 or any others acting on their behalf have conducted searches
20 or investigations to locate books or other written records of
21 folktales containing" -- and then there is a list -- "A,
22 the Russian folktale mentioned on the title page of Plaintiffs
23 copyrighted book entitled "My Mother is the Most Beautiful
24 Woman in the World," B, the old story overheard by Jon Stone,
25 C, the folktales mentioned by Tibor Gergely, D, any other

DEFENDANTS CONCEDE THAT THERE IS NO OTHER ENGLISH
LANGUAGE VERSION OF STORY

1 T-273

O'Conner-Cross

A-68

2 folktales embodying the story of plaintiffs' said copyrighted
3 book."

4 Interrogatory 16 says:

5 "If the answer to any of the subdivisions of the
6 foregoing interrogatories is in the affirmative, A, state
7 where, when and by whom the searches and investigations were
8 conducted, B, the card indices, catalogs and other sources which
9 were covered, C, the countries of origin and language of the
10 folktales which were searched or investigated, and D, the
11 results of the search for foreign investigations."

12 Defendants' response to Interrogatory 16 is as
13 follows:

14 "A, Roberta Miller made a telephone call to the
15 information section of the New York Public Library, the
16 librarian looked in the book entitled "Books in Print,"
17 C, the English language in the United States, D, books in print
18 indicated that the story was to be found in plaintiffs' copy-
19 righted book" -- that's Mrs. Reyher's book -- "and in a
20 collection of stories entitled "Holiday Roundup" which is
21 Plaintiffs' Exhibit 25 for identification."

22 Now, do you have any knowledge of this work that
23 was done by Roberta Miller?

24 MR. GIRDEN: Objection, your Honor.

25 THE COURT: Sustained. It is clearly one hundred

PLAINTIFF REYHER'S WORK INVOLVED
HER OWN ORIGINAL INPUT

A-69

1 T - 136

Reyher-Cross

2 Q "The woman came running. There were orders from
3 Kolya, the village leader."

4 A Well, on my page where he sent people out I say,
5 "From every direction, friendly, goodhearted boys ran to
6 village homes with orders to bring back the beautiful women."
7 That's on my page 26. No, it's my page 24: "From every
8 direction, friendly, goodhearted boys ran to village homes
9 with orders to bring back the beautiful women."

10 And they say, "He sent people to all the villages
11 nearby and in each village they chose the most beautiful woman
12 and brought her back to the lost little boy."

13 Q Is there anything on that page which you claim is
14 in any way duplicative expression by the defendant?

15 A Those words that I just read to you.

16 Q Is there anything else other than those words?

17 A Well, as I testified, I introduced the words "bring
18 back" --

19 Q No, you already testified to that. I say other
20 than you already testified to.

21 A All right, then I will pass it.

22 Q How about the next page? Your pages aren't
23 numbered.

24 A Page 26 of my booky.

25 Q No, I think we are up to --

COMPARISON OF ILLUSTRATIONS

A-70

PLAINTIFFS' ILLUSTRATION



DEFENDANTS' ILLUSTRATION



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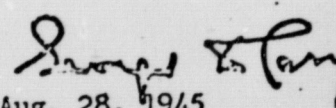
Becky Reyher and Ruth Cannett,
c/o McIntosh and Otis, Inc.,
18 E. 41st St., New York, N.Y.

Title: My Mother is The Most Beautiful Woman In The World.
A Russian Folktale.
Retold by Becky Reyher, of United States.
Pictures by Ruth Cannett.

Printed or produced by Robert T. Weaver Associates, Inc.,
New York, N.Y.

Date of publication in the United States Aug. 24, 1945
Affidavit received Sept. 19, 1945

Copies received Aug. 28, 1945



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